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No. 92-595

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In the Supreme Court of the United States

OCTOBER TERM, 1992

JOE W. REID, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the municipal board of which petitioner was a member received more than $10,000 in "benefits" under a federal program, thus rendering petitioner liable under 18 U.S.C. 666 for the corrupt acceptance of funds in connection with a transaction of the board.

2. Whether, in a prosecution for willfully attempting to evade tax in violation of 26 U.S.C. 7201, the trial court erred in refusing to give petitioner's requested good faith instruction, when the court fully and correctly instructed the jury on willfulness.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. AI-1) is unpublished, but the judgment is noted at 959 F.2d 972 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1992. Petitions for rehearing were denied on July 6, 1992. Pet. App. AII-1. The petition for a writ of certiorari was filed on October 5, 1992 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the Northern

District of Alabama of willfully attempting to evade income tax, in violation of 26 U.S.C. 7201 (Count 1), and corruptly accepting a bribe as a member of a governmental organization receiving federal funds, in violation of 18 U.S.C. 666 (Count 2). Petitioner was sentenced to 12 months' imprisonment on Count 1 and to a concurrent term of five years' imprisonment on Count 2, and he was fined $35,000. Gov't C.A. Br. 3. The court of appeals affirmed. Pet. App. AI-1.

1. Petitioner was a member of the Water Works Board of the City of Birmingham, Alabama (the Board). During 1985, petitioner formed a partnership with several local businessmen in order to purchase property from a company known as U.S. Pipe, Inc. On April 30, 1986, three of petitioner's partners met with David Vann, the Board's Chairman, and with the general manager of the Water Works. Without disclosing that petitioner was a member of the partnership, petitioner's partners stated that the partnership had an option to purchase the U.S. Pipe property and that they wanted to develop the land and negotiate land use restrictions with the Board. Vann responded that he preferred that the Board buy the property, attach restrictive covenants, and then give the partnership an option to buy portions of the land for development. Gov't C.A. Br. 4-5.

At a meeting on May 14, 1986, which petitioner did not attend, the Board considered whether to purchase the U.S. Pipe property. Because petitioner was absent, the Board sought assurance that he was not personally involved in the transaction. Vann then called petitioner to ask whether he had any financial interest in the U.S. Pipe property. Petitioner denied

having any such interest, and Vann reported that statement to the Board. The Board then voted to acquire the property. Gov't C.A. Br. 5-6. On December 12, 1986, three days prior to the closing date of the sale, the Board met to discuss the restrictive covenants for the property. At the meeting, petitioner argued for relaxed restrictions to encourage development. *Id.* at 7-8.

Subsequently, the Board acquired the property for a total of $5,876,935.68. For the sale of the option on the property, the Board also paid $1,163,143.52 to a company owned by one of petitioner's partners. In turn, that company issued checks to an entity known as Emory Trust, whose partners included an entity called ALAGA, which was controlled by petitioner. As a partner in Emory Trust, ALAGA received a check from the sale of the option in the amount of $188,150. The check was deposited into an investment company account in South Carolina in the name of ALAGA. The address for ALAGA reflected in the account records was the address of petitioner's son in Georgia. Gov't C.A. Br. 8.

After the land sale closed, petitioner continued to lobby the Board to relax the restrictive covenants. Petitioner never revealed that he was a partner in the group that arranged the property transaction. He disclosed his involvement only when confronted by Vann after the transaction came under investigation. Gov't C.A. Br. 8-9.

2. In 1990, petitioner was indicted for tax evasion and bribery. Gov't C.A. Br. 3. The theory of the tax evasion count was that petitioner willfully attempted to evade his income tax for 1986 by depositing his

share of the proceeds from the real estate transaction in an out-of-state account under the name ALAGA. *Id.* at 26-28. The theory of the bribery count was that petitioner had received a payment as a member of the Board "intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of" the Board, and that the Board received in 1986 "benefits in excess of $10,000 under a Federal program" involving a form of federal assistance (18 U.S.C. 666).[1] Gov't C.A. Br. 28. The jury convicted petitioner on both counts.

3. On appeal, petitioner argued that his conviction under 18 U.S.C. 666 could not stand because the Board was not an organization that had received in one year more than $10,000 in benefits under a federal program involving federal financial assistance. Petitioner also argued that the district court erred in refusing to give the jury petitioner's requested instruction with respect to his good faith defense to the tax evasion charges. The court of appeals affirmed in an unpublished order. Pet. App. AI-1.

ARGUMENT

1. Petitioner contends (Pet. 12-19) that he was not subject to prosecution under 18 U.S.C. 666, because the municipal body on which he served did not receive federal "benefits in excess of $10,000 under a Federal program" when the State used federal monies to

[1] The State of Alabama Highway Department made five payments to the Board during 1986 to reimburse it for certain expenditures in moving water lines. The payments included federal funds from the Federal Highway Trust Fund. The federal funds paid to the Board exceeded $10,000. Gov't C.A. Br. 9, 29-31.

reimburse the Board for expenditures the Board made. The court of appeals correctly rejected that claim, and its decision does not conflict with any decision of another court of appeals. As petitioner notes, the issue is one of "first impression" in the courts of appeals. Pet. 13. Accordingly, this Court's review is not warranted.

In relevant part, Section 666 makes it a crime for "an agent * * * of a State, local, or Indian tribal government, or any agency thereof[,] * * * corruptly [to] accept[] or agree[] to accept[] anything of value from any person, intending to be influenced or rewarded in connection with any * * * transaction * * * of such * * * government[] or agency involving any-thing of value of $5,000 or more." 18 U.S.C. 666(a)(1)(B). Section 666 is applicable, however, only if the

> government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

18 U.S.C. 666(b). Congress enacted Section 666 to "create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies that are disbursed to private organizations or State and local governments pursuant to a Federal program." S. Rep. No. 225, 98th Cong., 1st Sess. 369 (1983).

Petitioner argues (Pet. 12-15) that he was not subject to prosecution under Section 666 because the funds received by the Board did not constitute "benefits" or "Federal assistance" within the meaning of 18 U.S.C. 666(b). He asserts (Pet. 12-13, 15, 18)

that even though the State paid the Board more than $10,000 in federal funds from the Federal Highway Trust Fund, see note 1, *supra*, those payments do not qualify as "benefits" because they were made in "strictly commercial transactions" and served only to reimburse the Board for the costs of material and labor involved in relocating water lines. The language, history, and purposes of Section 666 reveal that that contention is incorrect.

Section 666 applies to government entities that receive "benefits * * * under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. 666(b). The natural reading of that provision is that it covers a state or local entity that is paid federal funds pursuant to a federal program designed to give financial support to specified activities. Contrary to petitioner's suggestion (Pet. 15), the statute does not require that the state or local entity profit from the receipt of the funds. The noun "benefit" is defined to mean, *inter alia*, "useful aid." *Webster's Third New International Dictionary* 204 (1986). That definition readily applies to federal assistance used to reimburse a local government entity for the costs of relocating water lines.[2]

[2] Section 666 has routinely been applied to corrupt officials who work for entities that receive federal program funds, and no court has suggested that the funds were not "benefits" absent a showing that the recipient earned profits. See, *e.g.*, *United States* v. *Westmoreland*, 841 F.2d 572 (5th Cir.) (county received revenue-sharing funds from the federal government), cert. denied, 488 U.S. 820 (1988); *United States* v. *Sadlier*, 649 F. Supp. 1560 (D. Mass. 1986) (hospital received medicare payments for patient service).

The history of Section 666 confirms that it applies to benefits paid under a federal program to reimburse a state or local entity for costs incurred. The Senate Report on the bill that became Section 666 stated that

> The Committee intends that the term "Federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance, or another form of Federal assistance" be construed broadly, consistent with the purpose of this section to protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery.

S. Rep. No. 225, *supra*, at 370. While Congress did not intend the provision to have "unlimited" reach, the limitation that Congress described is that the provision should not be applied to all federal contractors or suppliers; there must be a statutory scheme that authorizes the disbursement of federal funds to achieve identified "policy objectives." *Ibid.* Here, the disbursements were not "strictly commercial" payments to a contractor or supplier. Pet. 15, 18. Rather, the federal funds at issue were authorized to be disbursed from the Federal Highway Trust Fund, established pursuant to 26 U.S.C. 9503, and the funds were allocated pursuant to 23 U.S.C. 121 and 123 to support local utility work.[3]

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[3] Section 123 provides that federal funds may be used to reimburse a State for costs incurred in the relocation of utility facilities necessitated by the construction of a project on any "Federal-aid system." The federal funds in this case were earmarked for and paid to the Board for the relocation of water lines. Gov't C.A. Br. 29.

Finally, the purpose of Section 666—to protect the integrity of funds expended through federal assistance programs—supports its application to payments made in a federal spending program that reimburses the recipient for costs incurred or services performed in accordance with the goals of the program. When a municipal body receives federal funds to compensate it for the provision of goods, services, or programs, it jeopardizes the integrity of the federal scheme and threatens to waste federal funds if the body's officials engage in corrupt activities in the transaction of official business.

In sum, because the court of appeals correctly rejected petitioner's argument that the Board did not receive federal "benefits," and no other court of appeals has addressed that issue, petitioner's claim does not merit further review.[4]

2. Petitioner contends (Pet. 20-27) that the district court's refusal to give his requested instruction on

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[4] Petitioner relies (Pet. 17) on *United States* v. *Stewart*, 727 F. Supp. 1068 (N.D. Tex. 1989), and *United States* v. *Webb*, 691 F. Supp. 1164 (N.D. Ill. 1988). Even if those decisions supported petitioner, a conflict between two district court decisions and the unpublished affirmance in this case would not warrant this Court's attention. In any event, those cases are distinguishable from this one. In *Stewart* the entity was a private contractor that was paid for providing equipment to the government. 727 F. Supp. at 1072. Here, the Board was a local government entity that received federal program monies to support local services. In *Webb*, the court held that the accounting firm for which the defendant worked was a conduit for distributing federal funds to others, not the ultimate recipient of them. 691 F. Supp. at 1169-1170. Here, the ultimate recipient was the Board.

good faith was inconsistent with *Cheek* v. *United States*, 111 S. Ct. 604 (1991). He also suggests (Pet. 24-26) that the absence of a good faith instruction shifted the burden of proof on the element of willfulness to him and therefore violated his due process rights. Those contentions are without merit.

At trial, the district court gave the following willfulness instructions on the tax evasion count (Instruction Tr. 121-122):

> The defendant can be found guilty of the events charged in Count One [charging tax evasion] only if all of the following facts or elements are proved beyond a reasonable doubt: First, the defendant owed substantial income tax in calendar year, [*sic*] in addition to that declared on his return and (2), that the defendant knowingly and willfully attempted to evade or defeat that tax. The proof need not show the precise amount of the additional tax due as alleged in the indictment but it must establish beyond a reasonable doubt that the defendant knowingly and willfully attempted to evade or defeat some substantial portion of such additional tax as charged.
>
> * * * * *
>
> The word "willfully" as that term is used in this case means that the act was committed voluntarily and purposely with the specific [intent] to do something the law forbids; that is to say, to act with bad purpose either to disobey or to disregard the law.

> The word "knowingly" means that the act was done voluntarily and intentionally and not because of accident or mistake.

The court refused to give petitioner's requested "good faith" instruction, which stated:

> Reliance upon conduct of others in good faith, is not punishable under 26 U.S.C. § 7201. It is an absolute defense that the Petitioner conducted himself in good faith. In evaluating the Petitioner's good faith, you must consider whether the Petitioner relied upon his accountant and trust partners for information, whether he even filed a tax return, whether he used his taxpayer I.D. number appropriately, whether he sent any money to the IRS in 1987.

Pet. 10-11, quoting Court's Exh. 2, 5 R. 71.

Petitioner's contention that the trial court erred in refusing to give a separate good faith instruction is foreclosed by *United States* v. *Pomponio*, 429 U.S. 10 (1976) (per curiam). In *Pomponio*, the court of appeals accepted the defendant's claim that, even though the trial court gave "full and complete" instructions on the requirement of a knowing evasion of taxes, "[s]ince a good faith belief would tend to negate the elements of willfulness and knowledge, [the defendants] were entitled to [such] an instruction." *United States* v. *Pomponio*, 528 F.2d 247, 249-250 (4th Cir. 1975). This Court reversed that holding. The Court held that when the trial judge has "adequately instructed the jury on willfulness" in a tax evasion case, "[a]n additional instruction on good faith [is] unnecessary." 429 U.S. at 13.

Here, as in *Pomponio*, the jury was properly instructed on willfulness. Willfulness under the criminal tax laws means the "voluntary, intentional violation of a known legal duty." *Cheek* v. *United States*, 111 S. Ct. at 610; *Pomponio*, 429 U.S. at 12; *United States* v. *Bishop*, 412 U.S. 346, 360 (1973). The trial court's explanation of willfulness in this case was in accord with that definition. The trial court instructed the jury that the term "willfully" means "that the act was committed voluntarily and purposely with the specific [intent] to do something the law forbids; that is to say, to act with bad purpose either to disobey or to disregard the law." That instruction was virtually identical to the instruction found to be adequate in *Pomponio*.[5] Under it, the jury cannot convict if it finds that the defendant believed in good faith that he was complying with the tax laws, because such a belief would negate the specific intent to do something forbidden by the law and with the bad purpose to disobey or disregard the law. Accordingly, as in *Pomponio*, the court was not required to give a separate instruction on good faith.

Petitioner contends (Pet. 20, 23) that *Cheek* v. *United States*, *supra*, implicitly overrules *Pomponio*'s holding that an additional instruction on good faith is not necessary. That claim is incorrect. In *Cheek*, this Court cited *Pomponio* with approval and specifically reaffirmed its holding that an additional

[5] In *Pomponio*, the jury was instructed that "[a] willful act" is "one done 'voluntarily and intentionally and with the specific intent to do something which the law forbids, that is to say with [the] bad purpose either to disobey or to disregard the law.'" 429 U.S. at 11; see also *id.* at 11 n.2.

instruction on good faith is unnecessary when a jury is properly instructed on willfulness. *Cheek*, 111 S. Ct. at 610. The Court held only that in a tax evasion case, it is error to instruct the jury that "a claimed good-faith belief must be objectively reasonable if it is to be considered as possibly negating the Government's evidence purporting to show a defendant's awareness of the legal duty at issue." 111 S. Ct. at 611. That holding is fully compatible with the holding of *Pomponio* that the standard instructions on knowledge and willfulness are adequate to present the good-faith defense to the jury.

Petitioner also contends (Pet. 24-26) that the absence of a separate good faith instruction shifted to him the burden of proving that he acted in good faith and did not act willfully. There is nothing in the instructions that placed any burden on petitioner. Although petitioner asserts (Pet. 25-26) that once a legal duty is established in a tax prosecution, a defendant "is implicitly 'presumed' to know of his legal duty," the instructions did not authorize the jury to presume knowledge. Rather, they put the burden squarely on the government to show that petitioner willfully violated the tax laws. Accordingly, the instruction did not unconstitutionally relieve the government of its burden of proof.[6]

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[6] Petitioner's reliance on *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), is therefore misplaced. In *Sandstrom*, the trial court erroneously instructed the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." 442 U.S. at 513. The jury was not instructed to follow any such presumption here.

Although this Court's decision in *Pomponio* makes clear that a separate good faith instruction is not required, see *United States* v. *Solomon*, 825 F.2d 1292, 1297 (9th Cir. 1987), cert. denied, 484 U.S. 1046 (1988); *United States* v. *Kelley*, 864 F.2d 569, 573 (7th Cir.), cert. denied, 493 U.S. 811 (1989), some courts have held that a separate good faith instruction is required where there is an evidentiary basis for it. See *United States* v. *Mann*, 884 F.2d 532, 536-537 (10th Cir. 1989); *United States* v. *Harting*, 879 F.2d 765, 767-768 (10th Cir. 1989); *United States* v. *Duncan*, 850 F.2d 1104, 1117-1118 (6th Cir. 1988). We believe that those decisions are incorrect. Even under the rule requiring a separate good faith instruction, however, petitioner would not prevail because there was no evidentiary foundation for a separate instruction on good faith here, and because the instruction requested by petitioner was not an accurate statement of the law.

Petitioner's requested good faith instruction would have told the jury to consider whether petitioner relied in good faith upon the conduct of other persons in conducting his tax affairs. See p. 10, *supra*. There was no evidentiary foundation for the proposition that petitioner relied on other persons, however. Gov't C.A. Br. 22-25. Petitioner did not testify that he relied on other persons, and it does not follow from the fact that an accountant for another party gave tax advice to petitioner that petitioner in fact relied on that advice. *United States* v. *Masat*, 948 F.2d 923, 930 (5th Cir. 1991) ("contact" with professionals "does not necessarily indicate reliance on these professionals' advice"), cert. denied, 113 S. Ct. 108 (1992). Moreover, in discussing the element of reliance (Pet. 8),

petitioner does not assert that he relied on the advice of others in scheming to hide his partnership income from the U.S. Pipe transaction in a nominee out-of-state bank account. In short, in the absence of evidence of reliance, petitioner was not entitled to an instruction that would have invited the jury to speculate about reliance. *United States* v. *Schmidt*, 935 F.2d 1440, 1448-1449 (4th Cir. 1991); *United States* v. *Snyder*, 766 F.2d 167, 169 (4th Cir. 1985).

Nor did petitioner's proposed instruction accurately state the law. The proposed instruction stated that "[i]t is an absolute defense that the [p]etitioner conducted himself in good faith." See p. 10, *supra*. That is incorrect. It is not enough that petitioner "conducted himself in good faith" as a general matter; what was required was that petitioner had a good faith belief that he was in compliance with the tax statutes. *Cheek*, 111 S. Ct. at 610-611. Petitioner's instruction, therefore, would have been misleading to the jury.

Because a court is not required to give a theory-of-defense instruction that lacks support in the record or that is inaccurate, see *Mathews* v. *United States*, 485 U.S. 58, 63 (1988); *United States* v. *Jungles*, 903 F.2d 468, 478 (7th Cir. 1990), petitioner would not benefit even if the requirement of a separate good faith instruction were applied in this case. This Court's review of whether such an instruction would be required in another case is not warranted.[7]

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[7] It is also doubtful that the conflict on that issue merits this Court's review. This Court recently denied certiorari in a case presenting the question whether a separate good faith instruction is required in a false statements and mail fraud

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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prosecution (18 U.S.C. 1001, 1341) in which the jury was correctly and completely instructed on willfulness. *United States* v. *Gross*, 961 F.2d 1097 (3d Cir.), cert. denied, 113 S. Ct. 439 (1992) (No. 92-205). In that case, while noting that the courts of appeals are in conflict on the separate-good-faith-instruction issue with respect to certain offenses, we opposed certiorari because the issue does not have sufficient importance in the administration of federal criminal trials to warrant this Court's review. U.S. Br. in Opp. 12. (We have provided a copy of our brief in opposition in *Gross* to petitioner.) The same conclusion applies to the parallel issue under the criminal tax statute that is presented in this case.